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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF OF APPELLANTS

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is printed in the Appendix at page 38.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as being an appeal which draws into question the validity of California Government Code §845.8(a) *infra*, page 4, on the ground that as construed it is repugnant to the Constitution of the United States.

Appellants seek damages from state officials for the wrongful death of their daughter. Demurrers to their Complaint were sustained on the ground that California Government Code §845.8(a) provides absolute immunity from civil liability for causing a loss of life because "there is a rational relationship between the state's purposes and the statute." (A.44)

The appeal herein is from a final judgment decided and filed by the Court of Appeal for the State of California, Fourth Appellate District, Division One, on September 22, 1978. On November 15, 1978, Appellants' Petition for Hearing in the Supreme Court of the State of California was denied. Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on February 5, 1979. On May 21, 1979, this court made an order noting probable jurisdiction of this matter.

As the Court of Appeal of the State of California explicitly rejected Appellants' challenge to the constitutionality of California Government Code §845.8(a), this matter is appropriately brought to this Court by appeal. *Sibron v. New York*, 392 U.S. 40 (1968).

ADDITIONAL GROUND OF JURISDICTION

The Appellants also contend that the judgment is founded on another error, which though it involves a question not subject to review by this Court of appeal, nevertheless deprived the Appellants of a fair hearing. The Court of Appeal of the State of California found that Respondents had absolute immunity from suit in an action brought under 42 U.S.C. §1983. This error is included in the statement of the questions presented by the appeal hereinafter set forth. If this were the only error complained of, Appellants would be limited to a petition for writ of certiorari under 28 U.S.C. §1257(3). It is included on this appeal under the authority of *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530, 547 (1922) and *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves California Government Code §845.8(a) which states:

> "Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner or from determining the terms or conditions of his parole or release or from determining whether to revoke his parole or release."

This case also involves 42 U.S.C. §1983 which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Whether California Government Code §845.8(a), When Construed To Grant Absolute Immunity To State Officials From Civil Liability For Their Acts Which Caused A Loss Of Life Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The Constitution Of The United States.

II. Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant To 42 U.S.C. §1983 For Acts Which Caused A Loss Of Life.

STATEMENT OF THE CASE

RICHARD JUNE-JORDAN THOMAS was convicted on December 12, 1969, of the attempted forcible rape of two young females at knifepoint in Tecolote Canyon in San Diego, California. From January to July, 1970, THOMAS was committed to the Atascadero State Mental Hospital for

observation where he was designated as a "Mentally Disordered Sex Offender" not amenable to treatment. In April, 1970, he was sentenced by the Honorable LELAND C. NEILSEN of the San Diego Superior Court for a period of six months to twenty years. That court made the specific comment that THOMAS should not be paroled. Although he had been designated as a "mentally disordered sex offender," had been adjudged by the Atascadero State Mental Hospital as "not amenable to treatment," and in fact had received no treatment while incarcerated, THOMAS was subsequently paroled on March 10, 1975. THOMAS was paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact was paroled. THOMAS' parole was subject to special conditions, including the condition that he regularly appear at a "parole out-patient clinic." In fact, THOMAS was not supervised, and the conditions which were attached to his parole were not met, and he did not regularly appear at his designated "parole out-patient clinic."

RICHARD JUNE-JORDAN THOMAS subsequently kidnapped and murdered MARY ELLEN MARTINEZ, age 15, on August 1, 1975, in the same Tecolote Canyon of San Diego, California. THOMAS was duly convicted and on April 13, 1976, the Honorable EDWARD T. BUTLER sentenced THOMAS to death in the San Quentin state prison gas chamber.

Appellants' original Complaint for Damages for Wrongful Death and Civil Rights Violation (A.1) was filed with the San Diego Superior Court on May 25, 1976. The Honorable LOUIS M. WELSH filed a Minute Order (A.16) with the Court on September 1, 1976, which sustained Respondents' Demurrer

as to causes of action I, II, III, IV, V and VI, with leave to amend causes of action I and VI.

Appellants' First Amended Complaint (A.19) repleads causes of action II, III, IV and V verbatim from their original Complaint (A.1) and incorporates amended portions of causes of action I and VI. The gravamen of Plaintiff's charges were as follows:

1. The first cause of action alleges that Respondent members of the California Adult Authority acted in a manner so unreasonable and so abused the exercise of their discretion and judgment in releasing THOMAS on parole that their conduct was outside the course and scope of their employment.

2. The second cause of action alleges that Respondent parole officials negligently and recklessly performed ministerial acts in releasing THOMAS.

3. The third cause of action alleges that Respondent parole officials negligently and recklessly failed to warn probable victims of their release of THOMAS.

4. The fourth cause of action alleges that Respondent parole officials wilfully, wantonly and maliciously failed to supervise THOMAS while on parole.

5. The fifth cause of action alleges that Respondent parole officials' acts under color of state law subjected MARY ELLEN MARTINEZ to deprivation of a fundamental constitutional right without due process.

6. The sixth cause of action alleges that Respondent parole officials acted wilfully, maliciously, wantonly and recklessly in

paroling THOMAS, in failing to supervise him and in failing to warn victims of his release; and alleges the knowledge and ratification of their acts by the State of California.

The first and sixth causes of action were subsequently demurred to by Respondents on October 14, 1976, and the Honorable DOUGLAS R. WOODWORTH sustained Respondents' Demurrer (A.35) as to those causes of action on November 8, 1976, without leave to amend.

On December 20, 1976, Appellants appealed from the Notice of Entry of Judgment of November 24, 1976. The Court of Appeal of the State of California, Fourth Appellate District, Division One, affirmed the lower Court's ruling on September 22, 1978 (A.38). The Supreme Court of the State of California denied Appellants' Petition for Hearing on November 15, 1978, (A.46) and the judgment of the Court of Appeals was entered on November 27, 1978.

On May 21, 1979, this court made an order noting probable jurisdiction in the matter.

SUMMARY OF ARGUMENT

I

PRELIMINARY STATEMENT

This case involves a significant social issue. That issue is whether state parole officials should be absolutely immune from civil liability for the grossly negligent or reckless release of highly dangerous prisoners. The question is whether it is necessary or appropriate to give unbridled discretion to parole officials.

This case arises in the context of a deprivation of a fundamental constitutional right. Because absolute immunity facilitates the deprivation of constitutional rights and is not necessary to a compelling state interest, this court should find that parole officials have only a qualified immunity.

II

STATE PAROLE OFFICIALS HAVE ONLY A QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR THEIR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. § 1983

Appellants allege in their complaint that the acts of Respondent parole officials under color of state law caused the death of MARY ELLEN MARTINEZ. The California courts found that the state officials were absolutely immune from suit under 42 U.S.C. § 1983. In the recent case of *Butz v. Economou*, 438 U.S. 478 (1978), this court concluded that absolute immunity from suit for unconstitutional conduct was appropriate only in exceptional situations. The critical factor affecting the appropriate degree of immunity is the availability of procedural safeguards to restrain unconstitutional conduct. There are no procedural safeguards that restrain unconstitutional conduct by parole officials other than the availability of civil suit pursuant to 42 U.S.C. § 1983. The conduct of parole officials is not subject to voter approval, parole proceedings are not adversarial in nature and the interests of the public are not independently represented.

The facts of this case are analogous to that presented in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Like the Governor of Ohio, these parole officials sent a dangerous force into society under circumstances which indicate their lack of good faith. Even though the *Scheuer* situation demanded prompt action to protect the public safety, absolute immunity was found inappropriate. In contrast, public safety demands that parole officials act with caution in paroling dangerous felons.

Qualified immunity has been found appropriate in other situations involving bureaucratic officials. It has been held that school officials must act in good faith in expelling a student from school. It has also been held that prison officials who exhibit a deliberate indifference to violating constitutional rights are subject to suit. Parole officials are not the type of official whose functions demand a full exemption from liability for constitutional violations.

III

CALIFORNIA GOVERNMENT CODE § 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURTS

The California Court of Appeal interpreted California Government Code § 845.8(a) to grant absolute immunity to parole officials. So construed, this statute facilitated and encouraged the state officials to exercise their authority in a grossly negligent or reckless manner causing the death of MARY ELLEN MARTINEZ.

This court has held that certain rights are of such importance that they must be considered fundamental. State action which

infringes on such rights can be justified only by a compelling state interest. Life is expressly protected from deprivation by state action without due process by the Fourteenth Amendment to the U.S. Constitution and must be considered a fundamental right.

California Government Code § 845.8(a) is not necessary to the accomplishment of a compelling state interest. The interests supporting immunity for parole officials are either not compelling or are adequately served by qualified immunity. Requiring parole officials to act in good faith would not inhibit them from exercising the duties of their office in a legitimate manner. The state's interest in public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct rather than immunizing them from liability for the grossly negligent and reckless release of highly dangerous felons. The right of a prisoner to a fair parole hearing is adequately served by requiring parole officials to act in good faith.

Although California Government Code § 845.8(a) serves no compelling state interest in the context of the deprivation of a fundamental constitutional right, the California Court of Appeal held that the statute was constitutional because "there is a rational relationship between the state's purposes and the statute." (A.44) The broad sweep of Government Code § 845.8(a) as construed by the California Court of Appeal is unjustified and amounts to a denial of due process.

IV

STATE PAROLE OFFICIALS WHO ARE GROSSLY NEGLIGENT OR RECKLESS IN THE RELEASE OF HIGHLY DANGEROUS PRISONERS ARE NOT ACTING IN "GOOD FAITH"

In evaluating the conduct of public officials, this court has applied an objective test of good faith. In *Wood v. Strickland*, 420 U.S. 308 (1975), it was stated that members of a parole board would be liable to suit under 42 U.S.C. § 1983 if they knew or reasonably should have known that their acts would violate constitutional rights.

Evaluating the conduct of parole officials objectively, one can determine that their grossly negligent or reckless release of highly dangerous prisoners does not satisfy the requirements of good faith. In *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), the Supreme Court of Arizona used a rationale analogous to that presented by this court in *Butz v. Economous, supra*. Because of the lack of safeguards to restrain the unconstitutional conduct of parole officials, that court held that parole officials should not be immune for grossly negligent or reckless release of highly dangerous prisoners.

The adoption of this test measuring good faith conduct of parole officials will provide an adequate safeguard from conduct likely to cause a deprivation of constitutional rights.

ARGUMENT

I

PRELIMINARY STATEMENT

The incidence of violent crimes in our country is among the most significant social issues of our day. Of particular concern are those violent crimes committed by convicted felons released on parole as rehabilitated. The overwhelming evidence is to the effect that our prisons are totally ineffective in rehabilitation. Indeed, it seems that prison effectively turns first-time offenders into confirmed, life long criminals. A shocking proportion of all violent crimes is committed by persons who have been convicted repeatedly of such crimes but who are routinely released as rehabilitated after a fraction of their sentence is served.

In light of figures showing astronomically high rates of recidivism, it is outrageous to expect the public alone to bear the risk that these rehabilitative efforts will fail without holding parole officials to a "good faith" requirement.

Appellants acknowledge the heavy burden of proof that accompanies an action brought against officials covered by a qualified immunity. Whatever atrocities may be visited on innocent members of the public by criminals released by parole officials in the negligent performance of their duties is without redress; but surely if the burden be met and it be shown that officials have acted in "bad faith," the public welfare is ill-served by the shield of absolute immunity.

The Supreme Court of Arizona came to precisely this conclusion in *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

> ". . . The question arises whether such unbridled discretion is appropriate in our modern society . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous . . . It is clear that the policy reasons for official immunity are much weaker than for judicial immunity. Thus, logic requires a lesser immunity; for immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when and at the level necessary. We hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and indeed is improper. We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society . . . The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking, outrageous actions. In any case, democracy by its very definition implies responsibility." *Id.* 1232-1233.

This court is not asked to assess the general propriety of the absolute immunity doctrine. Rather, this court must determine the impact of that doctrine on violations of fundamental constitutional rights. Appellants submit that no compelling state interest justifies absolute immunity for administrative officials in this context.

II

STATE PAROLE OFFICIALS HAVE ONLY A QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. § 1983

A. Appellants Have Alleged A Violation Of The Federal Civil Rights Act, 42 U.S.C. § 1983.

Appellants' fifth and sixth causes of action of their First Amended Complaint are for damages for violation of federal civil rights pursuant to 42 U.S.C. § 1983. (A.28-31)

Those causes of action allege that the acts of the individual Respondents, under color of state law, caused the death of MARY ELLEN MARTINEZ. It is clear that an action for wrongful death may be brought under the federal Civil Rights Act. The civil rights legislation was designed to protect citizens not only from violence that would injure, but also from violence that would kill. *Brazier v. Cherry* 293 F.2d 401 (5th Cir. 1961). In *Alvarez v. Wiley*, 71 Cal.App.3d 599, 604 (1977), the California Court of Appeal discussed the relationship of the state wrongful death statute with section 1983:

> ". . . if an action for the wrongful death of a relative is brought under the federal Civil Rights Act in a state court, then the state wrongful death statute will govern any claim for damages . . . This is because the federal courts have held that although no remedy is expressly provided under the federal Civil Rights Act for the death of a relative, section 1988 incorporates the state wrongful death statutes into section

> 1983 actions in order to effectively implement the policies of the federal act."

See also *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974).

B. California Statutory Immunity Is Irrelevant To An Action Brought Under 42 U.S.C. § 1983.

The trial court concluded that California Government Code § 845.8(a) barred MARTINEZ from stating a cause of action under 42 U.S.C. § 1983 (A.17). Such a conclusion was clearly incompatible with the supremacy clause of the Constitution. In *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819), Chief Justice Marshall stated:

> "[T]he states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Case law specifically holds that state law of immunity for public officials does not control in the interpretation of federal civil rights actions pursuant to 42 U.S.C. § 1983. *Kletschka v. Driver*, 411 F.2d 436 (2nd Cir. 1969). In *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970), it was stated:

> "Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983, or to adopt the states' remedies or procedures for the vindication of that right. It has never indicated an intent

> to engraft onto the federal right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed, the history of section 1983, summarized in *Monroe v. Pape, supra,* 365 U.S. 167 . . . vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act."

More recently the California Supreme Court conceded in *Williams v. Horvath,* 16 Cal.3d 834, 840 (1976), that "California may not impair federally created rights or impose conditions on them".

Public officials are protected from suit under 42 U.S.C. § 1983 by an immunity, the source of which stems from federal common law and not state statutes. The extent and application of that immunity is examined in detail herein.

C. The California Court Of Appeal Held That State Parole Officials Were Absolutely Immune From Civil Liability Under 42 U.S.C. § 1983.

The First Amended Complaint alleges that the conduct of Respondent state officials was reckless, malicious, wilful and wanton (A.25, 27, 30-31). The Court of Appeal of the State of California held that these state officials were immune from civil liability for their acts.

> "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the civil rights act." (A.42)

The conclusion of the Court of Appeal is therefore that the state parole officials are absolutely immune from suit under 42 U.S.C. § 1983, regardless of the nature of their acts.

Appellants assert that Respondents enjoy only a qualified immunity as to injuries to the public which does not protect their acts done in bad faith.

D. Absolute Immunity Is Inappropriate To Civil Rights Actions Under 42 U.S.C. § 1983.

1. Absolute Immunity Applies Only In Exceptional Situations.

In *Butz v. Economou,* 438 U.S. 478 (1978), this court analyzed in detail the justification for immunizing federal officials from civil liability for violations of constitutional rights. The court applied the rationales supporting immunity in suits brought against state officials under 42 U.S.C. § 1983. Those rationales were stated to be:

> "1. The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion;
>
> 2. The danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 497.

Applying these rationales, the court determined that federal executive officials should have only a qualified immunity from civil suit for their unconstitutional acts,

> ". . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507.

With respect to state parole officials the same analysis shows no exceptional circumstances which would make absolute immunity essential to the conduct of their duties.

The court's analysis of the officials in *Butz* focused on the duties of those officials and those factors which would act to restrain an abuse of discretion on their part. Absolute immunity was found appropriate only for those officials which are a part of the judicial process such as judges and prosecutors or analogous officials within a federal administrative agency. Of importance in that determination were those features of the judicial process which tend to enhance the reliability of information and the impartiality of decision-making. These features included:

1. The adversarial nature of the proceedings.
2. The right to an independent trier of fact.
3. The right to present evidence.
4. The right to a record of the proceedings.
5. The right to know the findings and conclusions on all issues of fact, law or discretion presented on the record.

2. Qualified Immunity Is Appropriate As A Safeguard To Restrain Unconstitutional Conduct.

The critical factor affecting the court's decision in *Butz* was the availability of procedural safeguards to control the official's unconstitutional conduct. Because the purpose of § 1983 is to

safeguard constitutional rights the court stated that absolute immunity was appropriate only in those situations where there were sufficient procedural safeguards to provide a remedy for the official's unconstitutional conduct. Such safeguards were found to be an integral part of the judicial process. Those administrative officials who were found to be functionally equivalent to true judicial officers were given absolute immunity. Those who were not were held subject to the requirements of good faith set forth in *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In contrast to those officials given absolute immunity in *Butz* the parole officials here involved have no functional equivalence to judicial officers. The granting of parole is not an adversarial process. The interests of the decedent were totally unrepresented. There is no independent trier of fact, right of confrontation, right to present evidence, or right of appeal on behalf of the public. With respect to MARTINEZ, these parole officials are akin to the state officials in *Scheuer* who were alleged to have recklessly and maliciously sent the National Guard with loaded weapons out into the public. These officials of the California Adult Authority sent RICHARD JUNE-JORDAN THOMAS out into society under circumstances indicating that he was an equally dangerous threat to the public safety.

American jurisprudence assumes that all individuals, whatever their position in government, are subject to federal law.

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the governments, from the highest to the lowest, are

creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Only in the exceptional situation where constitutional rights are otherwise adequately safeguarded may absolute immunity be applied.

The case of *Scheuer v. Rhodes*, 416 U.S. 232 (1974), illustrates the inappropriateness of applying absolute immunity in situations involving alleged civil rights violations. *Scheuer, supra* involved an action brought under section 1983 for the death of students killed by Ohio national guardsmen at Kent State University in May, 1970. Appellants brought suit against the governor, adjutant general and assistants because they:

> " 'Intentionally, recklessly, wilfully, and wantonly' caused an unnecessarly (*sic*) deployment of the Ohio national guard on the Kent State campus . . . which resulted in the death of plaintiffs' decedents . . . the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of the office." *Id.* at 235.

Chief Justice Burger, writing for a unanimous court, carefully analyzed the asserted justifications for immunity. Taking into account the need of high executive officials to act swiftly and promptly and to be able to rely on the information available to them, he concluded that:

> "Under the criteria developed by precedents of this court, § 1983 would be drained of meaning

> if we were to hold that the acts of a governor or high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights' . . . These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-248.

The reasons for limiting immunity which were advanced in *Scheuer* are equally applicable to the present fact situation. Indeed, defendants in *Scheuer* had a greater justifiable expectation that they would be immune from liability than Respondents have. For one thing, the executive officers in *Scheuer* were forced by the nature of the situation to make a quick decision as to whether to release a potentially dangerous force into society based on the information available to them at the time. In contrast, Respondents could and should have taken every precaution, gathered whatever information was reasonably necessary for a fair and complete evaluation before releasing this certainly dangerous force into society.

The *Scheuer* situation is one in which the freedom to act is to be encouraged because any impediment to quick action may resound to the detriment of the public safety. Yet, the court

correctly concluded that absolute immunity was unnecessary to achieve the requisite freedom of action. In contrast, in the parole of dangerous felons, the same considerations cut in the opposite direction. Greater freedom of action is a potential hazard to public safety. In this area of official conduct, it is in the public's interest to discourage precipitous action as well as the reckless and malicious action herein alleged. The rights of prisoners to a fair parole hearing are not prejudiced by the imposition of a "good faith" standard of conduct on parole board officials. But absolute immunity is a blank check which does nothing for the legitimate interests of prisoners or society, but rather encourages reckless and malicious action which endangers the public.

3. Qualified Immunity Has Been Applied To Bureaucratic Officials.

Courts have generally drawn a distinction among branches of government as to whether absolute or qualified immunity is appropriate. These distinctions have proven difficult to apply in the ever-growing "fourth branch of government", the bureaucracy. Our citizens have increasing contact with government in the form of administrations, authorities, boards, commissions and departments, which though nominally a part of the executive branch, perform legislative and judicial as well as executive functions. But even though bureaucratic bodies may perform judicial functions, the non-public nature of bureaucratic proceedings justifies application of a good faith requirement. The devices designed to protect abuse of the judicial process are generally absent from bureaucratic proceedings, including those of parole boards.

> "For years, the legislature has nelgected its responsibility of providing guidelines for boards charged with parole decision making . . . the parole board is one of the last bastions of unchecked arbitrary power in America." *Calfornia State Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California, Order Out of Chaos,* (1970).

It is not in the public interest that parole boards enjoy such unchecked arbitrary power. Absolute immunity for acts which exceed constitutional limits is now applied only in exceptional situations. Otherwise, this court has recognized that section 1983 was "intended to expose state officials to damages liability in some circumstances." *Procunier v. Navarette,* 434 U.S. 555, 561 (1978).

In *Wood v. Strickland,* 420 U.S. 308 (1975), two girls were suspended from high school for possession of intoxicating beverages at a school acitivity. The students brought an action for damages under 42 U.S.C. § 1983 against the school board, claiming that their federal constitutional rights of due process had been denied under color of state law. Justice White's opinion for the court analyzed the role of the particular officials:

> "As the facts of this case reveal, school board members function at different times in the nature of legislatures and adjudicators in the disciplinary process." *Id.* at 319.

Nevertheless, the court found absolute immunity unjustified:

> ". . . The judgment implicit in this common-law development is that absolute immunity would not be jusitifed since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320.

If the right of high school students not to be expelled is of sufficient importance that school board members may be required to act in good faith, then it is reasonable to expect that the life of a high school student is also of sufficient import that parole board members should be subject to the same standard. It must be understood that the standard of "good faith" imposed by the qualified immunity test of the *Butz, Scheuer* and *Wood* cases imposes a heavy burden of proof upon Appellants. In addition to proving the elements of a cause of action under 42 U.S.C. § 1983, they must show a lack of "good faith" on the part of Respondents. Thus, the question is properly framed as follows: Could Appellants state a cause of action against a school board whose bad faith actions expelled MARY ELLEN MARTINEZ from school, but be barred from stating a cause of action against parole board members whose bad faith actions caused her death?

In *Procunier v. Navarette*, 434 U.S. 555 (1978), this court analyzed the immunity doctrine in the context of a section 1983 suit by a prisoner against prison officials alleged to have negligently deprived him of constitutional rights. Summary judgment against the prisoner's claim was upheld based on the determination that section 1983 does not afford a remedy for

mere negligent deprivation of constitutional rights. However, the scope of immunity available to these officials was clearly not absolute:

> "We agree with petitioners that as prison officials and officers, they were not absolutely immune from liability in this section 1983 damages suit and could rely only on the qualified immunity described in *Scheuer v. Rhodes, supra*, and *Wood v. Strickland, supra*. Note 7 . . . N7. The Courts of Appeals have generally accorded prison and jail administrators performing discretionary functions a qualified immunity for monetary liability under section 1983. (citations)" *Id.* at 561.

Clearly, "a public official may be held liable in damages when his actions are found to violate a constitutional right . . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 707 (1977).

MARTINEZ has alleged that these same officials of the California Adult Authority acted recklessly, wilfully, wantonly and maliciously in causing the death of MARY ELLEN MARTINEZ. MARTINEZ seeks the opportunity to present evidence that the acts of these officials "exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim." *Procunier v. Navarette, supra*, at 568. (Berger, C.J., dissenting.)

The *Scheuer-Butz* line of cases represent the governing principles for resolving the question of damage actions against officers of government. The rationale is that a qualified immunity satisfies the competing interests of public safety and a zealous bureaucracy. A considered inquiry into the position and

role of the relevant officials here would not place them among those whose special functions demand a full exemption from liability for constitutional violations.

III

CALIFORNIA GOVERNMENT CODE § 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURTS

A. The California Court Of Appeal Interpreted Government Code § 845.8(a) To Grant Absolute Immunity To Parole Officials For Violating A Fundamental Constitutional Right.

California Government Code § 845.8(a) absolves members of the California Adult Authority of civil liability arising out of the decision to parole or revoke parole of a prisoner. In granting immunity from civil suit, § 845.8(a) departs from the fundamental legal policy of promoting distributive justice. For this reason, the statute should be interpreted narrowly. Nevertheless, the Court of Appeal of the State of California interpreted Government Code § 845.8(a) as precluding a remedy for violation of an express Constitutional right.

Such a grant of absolute and total immunity to any person holding office as a member of the California Adult Authority must be regarded as facilitating and encouraging such state officials to exercise their authority in a grossly negligent or reckless manner. Martinez contends that so construed or applied to the facts of this case, California Government Code § 845.8(a) violates the Fourteenth Amendment of the United States Constitution by depriving MARY ELLEN MARTINEZ of life without due process of law.

B. Life Is A Fundamental Right.

This court has held that certain rights are of such importance that they must be considered fundamental. In *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), Justice Cardozo defined rights as fundamental which were:

> ". . . of the very essence of a scheme of ordered liberty . . . a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "

The Fourteenth Amendment to the United States Constitution expressly protects life from deprivation by state action without due process. As Justice Brennan stated in his dissenting opinion in *Paul v. Davis*, 424 U.S. 693, 717 (1975):

> "There is simply no way in which the court . . . could declare that the loss of a person's life is not an interest cognizable within the 'life' portion of the due process clause."

The right to physical safety at the hands of the state is a right so basic that many other rights regarded as fundamental are of little consequence by comparison. The right to vote or speak freely may be essential to our scheme of ordered liberty but certainly no less so than the right to live at all.

C. Due Process Demands That Life Not Be Denied Unless Justified By A Compelling State Interest.

Recognizing that the right to life is a fundamental interest and that California Government Code § 845.8(a) encouraged and facilitated the deprivation of Appellant's life, the question

remains as to what the demands of due process are with respect to the facts of this case. Where a fundamental or constitutionally protected right is involved, this Court has held taht infringement of that right may be justified only where necessary to support a compelling state interest, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Martinez contends that life is a right so fundamental that its deprivation may be justified only by a compelling state interest.

This court has recognized substantive rights of privacy, procreation, contraception, child bearing, and free speech which can be limited only by showing a compelling state interest. Life, a right as fundamental as any recognized, deserves just as formidable a protective barrier. In *Roe v. Wade*, 410 U.S. 113, 155 (1973), Justice Blackman, in discussing the protection afforded a woman's right to control her pregnancy stated:

> "Where certain 'fundamental rights' are involved, the court has held that regulation limiting these rights may be justified only by a 'compelling state interest'. . . and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. . . ."

The California Court of Appeal determined that the type of right or harm was irrelevant to the standard of review for applicable state action. It is well settled that the nature of the invasion upon an individual right to a large extent determines the degree of justification the state must establish in constitutional adjudication. The Court of Appeal held "there is a rational relationship between the state's purposes and the statute" (A.44) and found that to be a sufficient basis for the

constitutional validity of the statute. By holding that the state's statute may abridge the fundamental right to life absent a compelling state interest, the Court of Appeal committed plain error and such holding is sufficient grounds for reversal.

D. Government Code § 845.8(a) Serves No Compelling State Interest In The Context Of This Case.

Various reasons have been advanced to justify the enactment and continued existence of California Government Code § 845.8(a). Analysis of the constitutional validity requires considerable inquiry into the competing interests involved in the legislative enactment and of society's interest in public safety. The harm that may be caused by inhibiting the governmental function of parole decision making must be balanced against the desirability of providing redress for a narrow class of substantive wrongs. An analysis of the state interests served by the absolute immunity doctrine shows that those interests are either not compelling or that absolute immunity is unnecessary to their accomplishment.

The court below cited the California law revision commission comment to Government Code § 845.8(a) to the effect that parole board members should have absolute immunity to perform their duties without pressure and fear of civil suit. This rationale concentrates on the injustice of subjecting those charged with a discretionary function to liability, and the necessity of protecting the decision making process.

While recognizing this interest as important, it cannot be viewed as so compelling as to override the paramount right to life. The question is essentially where to draw the line between

the basic constitutional duty of the state's agents and the assumption of responsibility by the public for society's rehabilitative efforts. This line may not constitutionally be drawn in favor of immunizing the Respondents totally without regard to the purpose, motive or reasonableness of their conduct. Furthermore, this interest is adequately served by a qualified immunity. A good faith standard would not inhibit parole officials from exercising the duties of their office in a legitimate manner.

It is not in the public interest to encourage the reckless and malicious release of dangerous felons. The duties and responsibilities of parole officials include the protection of the public safety. To the extent that absolute immunity encourages a grossly negligent, reckless or malicious exercise of discretion, such immunity is not in the public's interest. The state's interest in protecting the bad faith activity of its officials is certainly less important than the fundamental constitutional right at stake.

The public safety is a state interest of compelling proportions bearing upon application of Government Code § 845.8(a). A distinction must be drawn between suits by prisoners, where the state's interest in public safety would favor immunizing parole officials from suit by prisoners denied parole, and suits by members of the public for injuries or death caused by paroled officials. A suit by a member of the public for injuries or death caused by a paroled prisoner discourages the reckless and malicious parole of felons. The state's interest in the public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct, not by immunizing them from liability for the grossly negligent and reckless release of dangerous felons into society. As is stated in *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974):

> "It is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."

The right of a prisoner to a fair parole hearing is also a compelling state interest. However, a prisoner has no legitimate interest in being paroled when a good faith appraisal of his record shows that he is not entitled to be released. Martinez believes that qualified immunity provides sufficient protection for the prisoner. All that is required of state officials is good faith, certainly a minimal standard of conduct. A qualified immunity with an appropriate standard of conduct is a less intrusive alternative that would not interfere with the execution of correctional policy or impinge upon the legitimate interests of prisoners.

A grant of absolute immunity is not justified by any of these potentially compelling state interests in the context of a suit by an injured member of the public. When state interests impinge on fundamental rights,

> "Legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . ." *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The legitimate state interests at stake in this case may be fully realized by qualified immunity.

For these reasons, the broad sweep of Government Code § 845.8(a) as construed by the Court of Appeal is unjustified and amounts to a denial of due process.

IV

STATE PAROLE OFFICIALS WHO ARE GROSSLY NEGLIGENT OR RECKLESS IN THE RELEASE OF HIGHLY DANGEROUS PRISONERS ARE NOT ACTING IN "GOOD FAITH"

A. This Court Has Applied An Objective Test Of Good Faith.

In *Wood v. Strickland*, 420 U.S. 308, 322 (1975) this court stated:

> "We hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . ."

The relationship between parole officials and an injured member of the public is akin to that presented in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). As in *Scheuer*, the officials in the case at bar were unaware of the identity of the person whose constitutional rights were abridged at the time of their exercise of discretion. In *Scheuer*, the good faith exercise of discretion was evaluated objectively:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of the circumstances, coupled with good faith belief that affords a basis for qualified immunity. . . ." *Id.* at 247.

Factually, this case is analogous to *Scheuer, supra*, and falls squarely within the purview of section 1983 and the Fourteenth Amendment to the United States Constitution. Why then did the California Courts at the intermediate appellate level and the State Supreme Court fail to apply a limited immunity and the "good faith" test of *Scheuer*? The only plausible answer is that the communication of that standard has not been received and understood by the California courts. Communication, by its very definition, requires mutual understanding. This court has obviously not been understood by the courts of the State of California. Accordingly, this court must now announce the Supreme law of the land through the medium of the decision in this case.

B. Grossly Negligent Or Reckless Conduct Cannot Be "Good Faith."

The case of *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 654 P.2d 1227 (1977), involved the release of a dangerous prisoner who subsequently killed an individual. The court held that parole officials owed a duty to individual members of the general public in exercising their discretion to parole a prisoner with a history of violent and dangerous conduct.[1/] The standard of care owed is that of avoiding

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[1/] The Arizona Court relied on Restatement (Second) of Torts § 319 (1965), "Duty of those in charge of person having dangerous propensities.":

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

grossly negligent or reckless release of highly dangerous prisoners.

In establishing that standard, the Supreme Court of Arizona used a rationale analogous to that presented by this court in *Butz v. Economou,* 438 U.S. 478 (1978). The *Grimm* court stated:

> "In many bureaucratic and administrative decisions, there are few or no safeguards to take care of wrong, harmful decisions. Members of the legislature may be voted out of office - as may judges in Arizona. Judges may be reversed by an Appellate Court. The Board of Pardons and Paroles, however, has had no check on its unbridled discretion . . . we now abolish the absolute immunity previously granted to public officials in their discretionary functions. We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society. The authority wielded by so-called faceless bureaucrats has often been criticized . . . the more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct . . . in any case democracy by its very definition implies responsibility . . . in this day of increasing power wielded by governmental officials absolute immunity for non-judicial, non-legislative officials is outmoded and even dangerous." *Id.* at 1232-1233.

C. State Parole Officials Should Not Be Immune For Their Grossly Negligent Or Reckless Release Of Highly Dangerous Prisoners.

Martinez proposes that the test formulated by the Supreme Court of Arizona in the *Grimm* case is in accord with the concern shown by this Court in *Butz* that there be adequate safeguards to prevent the infringement of constitutional rights by parole officials.

The standard of conduct enumerated in *Grimm,*

> *"avoiding grossly negligent or reckless release of a highly dangerous prisoner,"* *Id.* at 1234 (emphasis ours).

strikes a proper balance between the competing interests. The adoption of this test will protect the public from premature release of highly dangerous prisoners. Concurrently, the board members' interests will be protected since they will be free from liability in cases where they have made reasonable decisions.

This test is consistent with and a direct application of the more general test of "good faith" which this court has repeatedly employed in other contexts.

Finally, and more importantly, the adoption of this test in measuring the good faith conduct of parole officials will provide an adequate safeguard from conduct likely to cause the deprivation of constitutional rights.

CONCLUSION

For the foregoing reasons we respectfully submit that this Court should decide that state parole officials are not absolutely immune from suit under the Civil Rights Act, 42 U.S.C. § 1983. We also urge this court to find that as construed, or as applied to the facts of this case, California Government Code § 845.8(a) is unconstitutional because it caused the deprivation of a fundamental constitutional right and is not necessary to the accomplishment of a compelling state interest. We further urge this court to decide that "good faith" of parole officials is inconsistent with their grossly negligent or reckless release of highly dangerous prisoners.

Respectfully submitted,

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